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767 THIRD AVENUE ASSOCIATES v. PERMANENT MISSION OF THE REPUBLIC OF ZAIRE: AN UNCOMPENSATED GOVERNMENTAL TAKING

INTRODUCTION

Diplomats enjoy many privileges and immunities which shield them from penalties or punishment others receive under the law of foreign states for the same actions.¹ Recent outrageous conduct by diplomats has placed those privileges and immunities under close scrutiny by the American public.² Never before, however, have diplomatic immuni-

1. The Vienna Convention outlines the privileges and immunities currently enjoyed by diplomats. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention]. Articles 29, 31, and 32 of the Vienna Convention govern the protection of diplomats who have violated the laws or customs of a receiving state. Article 29 proclaims that a diplomatic agent is inviolable and may not be arrested or detained. Article 31 protects the diplomat from criminal prosecution in a receiving state and also protects the diplomat from the civil and administrative jurisdiction in certain situations. Finally, Article 32 provides that a diplomat can be tried in a receiving state only if the diplomat's immunity is expressly waived by the sending state.

2. For example, foreign governments have used the protection of diplomatic immunity and the inviolability of the diplomatic pouch as a means to traffic illegal drugs into the United States. See *Diplomatic Immunity Legislation: Hearings on H.R. 7819 Before the Senate Comm. on Foreign Relations*, 95th Cong., 2d Sess. 56 (1978) (statement of Sen. Sarbanes) (discussing the use of diplomatic pouches for smuggling illegal material through customs). The extent and size of such drug trafficking operations is alarming. For example,

Four men were indicted . . . by a Federal grand jury on charges of conspiring since 1950 to import thousands of pounds of pure heroin into the United States through the use of diplomatic couriers with diplomatic immunity. The defendants . . . allegedly . . . used Mauricio Rosal, a former Guatemalan Ambassador to Belgium, to bring the heroin into this country.

U.S. Indicts Four as Members of Diplomatic Heroin Ring, N.Y. TIMES, Oct. 5, 1962, at 11.

Diplomatic immunity has even been used by government agents to abduct and kidnap individuals. See Leslie Shirin Farhangi, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1525 (1986) (discussing incidents that illustrate abuses of diplomatic immunity). For instance, Rome customs authorities realized that a large "diplomatic bag" destined for Cairo was emitting moans. *Id.* at n.41 (citing E. SATOW, SATOW'S GUIDE TO DIPLOMATIC PRACTICE 117 (Lord Gore-Booth 5th ed. 1979)). The officials seized the bag and found that it contained a drugged Israeli who had been kidnapped. *Id.* The bag was addressed to the foreign minister in Cairo and had been specially fitted to contain a human body — complete with a small chair, a helmet for the head, and metal clamps for the ankles and neck. *Id.* The bag had apparently been well used. *Id.*

Diplomatic immunity has even been used as a defense to murder. To illustrate, in a recent occurrence, charges brought against the grandson of the Brazilian Ambassador in Washington for shooting an American citizen outside a nightclub were dismissed on the grounds of diplomatic immunity. *Skeen v. Braz.*, 566 F. Supp. 1414 (D.D.C. 1983).

ties extended to foreign sovereigns infringed upon the constitutional rights of United States citizens as they did in the recent case, *767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire*.³

In *767 Third Avenue Associates*, the plaintiff, a New York City landlord, sought to evict Zaire's Mission to the United States from its rental premises when the Mission failed to meet its rental obligations.⁴ To prevent the eviction, Zaire raised the defense of diplomatic immunity.⁵ The Second Circuit accepted Zaire's defense and held that local concepts of fairness, such as eviction when rent is not paid, must not be invoked when they would upset international treaty provisions to which the United States is a party.⁶ The immunities extended to the Zairian Mission in *767 Third Avenue Associates* dealt a major blow to constitutionally protected property interests of United States citizens.⁷ As a result of *767 Third Avenue Associates*, American citizens' property rights must succumb when such property rights conflict with the United States' Government's decision to grant diplomatic immunity.⁸

This Note examines the Second Circuit Court of Appeals' opinion in *767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire* by exploring the inherent conflict between *767 Third Avenue Associates*' property rights under American law and the diplomatic privileges accorded the Zairian Mission under international law. In this regard, this Note first details the property rights of American citizens. The Note then discusses the government's obligation, under the Takings Clause of the Fifth Amendment to the United States Constitution, to compensate property owners when their land is appropriated for a public purpose. Next, this Note traces the history of diplomatic immunity. In particular, this Note addresses the concept of mission inviolability and the significance of the Vienna Convention. After providing the above background, the Note summarizes the Second Circuit's opinion in *767 Third Avenue Associates*. Then, the Note analyzes the court's opinion, highlighting the tension between the rights of *767 Third Avenue Associates* and those of the Mission, and discusses the impact of the court's decision. This Note concludes that,

3. 988 F.2d 295 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 74 (1993).

4. *Id.* at 296.

5. *Id.*

6. *Id.*

7. *Id.* For a discussion of the property rights of United States citizens, see *infra* notes 9-35 and accompanying text.

8. See *767 Third Avenue Assocs.*, 988 F.2d at 296 (asserting that "[e]nforcement of an owner's common law right to obtain possession of its premises upon the tenant's non-payment of rent may not override an established rule of international law").

at a minimum, the United States Government must compensate future landlords whose property rights are subordinated to the rights of a foreign sovereign in the name of diplomatic immunity.

I. BACKGROUND

This section begins by tracing the history of the right to own property under United States law and the scope of the government's obligation to compensate property owners under the Takings Clause. The section concludes by presenting a brief history of diplomatic immunity, including the doctrine of mission inviolability and the Vienna Convention.

A. *Property Rights of American Citizens*

The right to own property is a fundamental right conferred upon every United States citizen.⁹ This right has been described as a natural, inherent, inalienable right which predates the Constitution and is insusceptible to legislative restriction.¹⁰ For example, the Wisconsin Supreme Court has stated that the "liberty of the person and the right to the control of one's own property are very sacred rights which should not be taken away or withheld except for very urgent reasons."¹¹ Similarly, in *Grubel v. MacLaughlin*¹² the court asserted that "[t]he right of every owner of property to use [his property] in his own way and for his own purposes existed before the adoption of the Constitution and is guaranteed by that instrument."¹³ The Due Process Clause of the Fourteenth Amendment — which prohibits any state from depriving any person of life, liberty, or property without due process of law — protects landowners from state infringement upon their property rights.¹⁴

9. See, e.g., *Culp v. United States*, 131 F.2d 93, 98 (8th Cir. 1942) ("The right to the enjoyment of life and liberty and the right to acquire and possess property are fundamental rights of the citizens of the several states and are not dependent upon the Constitution of the United States or the Federal Government for their existence.").

10. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (holding unconstitutional a state regulation that went "beyond any of the cases decided by [the Supreme Court]").

11. *In re Colliton*, 164 N.W.2d 480, 483 (Wis. 1969) (quoting *Guardianship of Reed*, 182 N.W. 329, 330 (Wis. 1921)).

12. 286 F. Supp. 24 (V.I. 1968).

13. *Id.* at 27.

14. U.S. CONST. amend. XIV, § 1. See, e.g., *Culp v. United States*, 131 F.2d 93, 97 (8th Cir. 1942) (recognizing that the Due Process Clause of the Fourteenth Amendment prohibits any state from depriving any person of life, liberty, or property without due process of the law); *United States v. Cruikshank*, 92 U.S. 542, 554 (1875) (stating that the Fourteenth Amendment furnishes "an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society").

This governmental duty to preserve United States citizens' property rights has been characterized by the Texas Supreme Court as one of the most important functions of government.¹⁵ Likewise, the New York Court of Appeals emphasized the importance and extent of property rights in *Headley v. City of Rochester*,¹⁶ concluding that legislation deprives a person of his property rights when it prevents him from doing an act which he desires to do or diminishes the enjoyment or profit which he would otherwise derive from his property.¹⁷ Reflecting a similar view, the Second Circuit held in *Fox Film Corp. v. Trumbull*¹⁸ that "[a] law which deprives the owner of property of the power to make proper contracts respecting it, and to lease it, is obnoxious and invalid."¹⁹ Moreover, the United States Supreme Court has held that a landowner's property rights include the right to use, lease, and dispose of his land for any lawful purpose.²⁰ This well-recognized principal of protecting property rights is reflected in landlord-tenant law, which has traditionally supported a landlord's property rights by affording him remedies for a tenant's breach of a rental contract.²¹

B. *Compensation for Governmental Taking of Property*

Beyond the protections against private infringement, the Constitution also shields individuals' property from unjust governmental intrusion. This protection is accomplished by the Takings Clause, which requires the government to pay just compensation to a landowner whenever private property is taken for public benefit. In this context, "[p]roperty" consists, not in the thing said to be owned, but in the right to dominion over it, control of its use, and disposition [The property owner's] right to compensation for that part is a natural right, protected by express constitutional provisions."²² One such ex-

15. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977).

16. 5 N.E.2d 198 (N.Y. 1936).

17. *Id.* at 201.

18. 7 F.2d 715 (2d Cir. 1925).

19. *Id.* at 719.

20. *Terrace v. Thompson*, 263 U.S. 197, 215 (1923). See also *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) ("Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.").

21. For example, in Arkansas, "[a]ny person who shall rent any dwelling house, or other building or any land, . . . and . . . shall refuse or fail to pay the rent therefor, when due, according to contract, shall at once forfeit all right to longer occupy said dwelling house or other building or land." *Poole v. Ark.*, 428 S.W.2d 628, 629-30 (Ark. 1968) (quoting ARK. CODE ANN. § 50-523).

22. *Chicago, Burlington & Quincy R.R. Co. v. Public Util. Comm'n of Colo.*, 193 P. 726, 728 (Colo. 1920). The court further stated that

The right of a person or corporation, whose property is taken for public use, to compensation therefor, is guaranteed by both the state and the federal Constitutions. Such

licit constitutional provision is the Fifth Amendment to the United States Constitution which provides that "private property [shall not] be taken for public use, without just compensation."²³ Accordingly, the established rule is that where, in the exercise of its power of eminent domain, the government interferes with a property owner's rights to such an extent as to constitute a taking, such interference carries with it a concomitant promise under the Fifth Amendment to pay that property owner "just compensation."²⁴ Just compensation consists of

right, however, exists regardless of constitutional provisions. It is a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation is an incident to the exercise of the power of eminent domain.

Id. See generally 63A AM. JUR. 2d *Property* § 1 (1984) (stating that the Constitution does not create property interests; rather independent sources such as state law determine the scope of property rights).

23. U.S. CONST. amend. V. As is evident from the express language of the Takings Clause, the Supreme Court has noted that this provision does not absolutely prohibit the government from taking private property for public use, but rather it places a condition on the government's ability to exercise such power:

[T]he Amendment . . . is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation."

First Evangelical Lutheran Church v. Los Angeles County, Cal., 482 U.S. 304, 315 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

24. See *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973) (reiterating that the Fifth Amendment requires that private property not be taken for public use without "just compensation"). The power of eminent domain, which has been described as "an inseparable attribute of sovereignty — an inherent power founded on the primary duty of government to serve the common need and advance the general welfare" gives states the ability to convert private property to public use. *Bergen County Sewer Auth. v. Borough of Little Ferry*, 76 A.2d 680, 681 (N.J. 1950).

In *San Diego Gas & Elec. Co. v. San Diego*, in a dissenting opinion, Justice Brennan argued that claims for just compensation are grounded in the Constitution itself. 450 U.S. 621, 654-55 (1981) (Brennan, J., dissenting). Justice Brennan explained his argument as follows:

"The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment." The suits were thus founded upon the Constitution of the United States.

Id. (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)).

In addition, if a landowner believes that the government has effected a taking of his property and the government does not bring a formal condemnation action, the landowner may institute an "inverse condemnation" action. The inverse condemnation action seeks a judicial declaration that the landowner's property has been taken by the government. *First Evangelical Lutheran Church v. County of Los Angeles, Cal.*, 482 U.S. 304, 315 (1987) ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing

the full monetary equivalent of the property taken.²⁵ In other words, the owner is to be put in the same position monetarily as he would have been in if his property had not been subject to the governmental taking.²⁶ Such compensation consists of the fair market value of the property at the time of the taking.²⁷ The fair market value of property is measured by "what a willing buyer would pay in cash to a willing seller."²⁸

While certain restrictions may be placed on private property without constituting a taking on the part of the government, the Supreme Court has stated that regulations which go "too far" will be recognized as a governmental taking.²⁹ It is not essential, therefore, that the government physically appropriate the property for its own use for a taking to occur.³⁰ To assist courts in deciding whether a taking has resulted, in *Connolly v. Pension Benefit Guaranty Corp.*,³¹ the Supreme Court set forth three factors relevant in analyzing the degree of interference with property owners' rights.³² These factors include: 1) the extent to which the regulation interferes with the landowner's investment-backed expectations, 2) the economic impact of the regulation on the landowner, and 3) the character of the governmental action.³³

In sum, the compensation requirement is designed to protect the private property interests of all American citizens. The Supreme Court characterized this policy against uncompensated takings as a means by which "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."³⁴ Diplomatic Immunity is one such

character of the constitutional provision with respect to compensation' ") (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

25. *Almota Farmers*, 409 U.S. at 473.

26. *Id.* at 473-74.

27. *Id.* at 474.

28. *Id.*

29. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

30. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992) (stating that any governmental action that denies all economically beneficial or productive use of land is a compensable taking under the Fifth Amendment); *Pennsylvania Coal Co.*, 260 U.S. at 415 (articulating the "general rule . . . that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking"); *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970) (noting that a taking can occur simply when the government by its action deprives the owner of all or most of his interest in his property).

31. 475 U.S. 211 (1986).

32. *Id.* at 224.

33. *Id.* at 224-25.

34. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

"public burden" which should not be borne by private individuals alone without just governmental compensation.

C. Diplomatic Immunity: Mission Inviolability and the Vienna Convention

The United States Department of State Protocol characterizes diplomatic immunity as "a principle of international law [that] is broadly defined as the freedom from local jurisdiction accorded duly accredited diplomatic agents and members of their immediate household."³⁵ The concept of diplomatic immunity can be traced back to the time of primitive man.³⁶ As one commentator has observed: "[T]he more fundamental rules of diplomatic law — that the person of the ambassador is inviolable and that a special protection must be given to the messages which he sends and receives from his sovereign — have existed from time immemorial among civilized states."³⁷ Moreover, the records of the early kingdoms of the Middle East, India, and China discuss rudimentary diplomatic activity.³⁸ For instance, diplomatic relations existed between Egypt and Turkey dating as far back as 1271 B.C.³⁹ Similarly, the ancient Greeks practiced diplomatic relations,⁴⁰ as did societies in biblical times.⁴¹

35. GRANT V. McCLANAHAN, *DIPLOMATIC IMMUNITY: PRINCIPLES, PRACTICES, PROBLEMS* 1 (1989) (referring to a formulation of diplomatic immunity propounded in a United States Department of State Office of Protocol paper in 1981).

36. *Id.* at 18. Dr. Ragnar, a specialist in diplomacy, studied the anthropological evidence of existing primitive people at this elemental level of social development. *Id.* He concluded that primitive societies develop customary procedures for starting wars, making peace, discussing trade, and sending intercommunity messages. *Id.* To facilitate these activities, the individuals who conduct intercommunity business are entitled to free movement and personal immunity. *Id.*

37. Farhangi, *supra* note 2, at 1518 n.8 (quoting E. SATOW, *SATOW'S GUIDE TO DIPLOMATIC PRACTICE* 106 (Lord Gore-Booth 5th ed. 1979)).

38. McCLANAHAN, *supra* note 35, at 19.

39. *Id.* In 1937, when Egypt was admitted into the League of Nations, the Turkish Delegation discussed, in its welcoming speech, the historical background of diplomatic relations between Egypt and Turkey. *Id.* For example, text discussing the treaty of peace and alliance between Hittite King Hattushilish III and Pharaoh Rameses II about 1271 B.C. was found in the Hittite language in Turkey and in hieroglyphics on the walls of an Egyptian temple at Luxor. *Id.*

40. *Id.* at 21. The Greek states, in 750-350 B.C., consistently fought one another and many times formed loose leagues and temporary alliances to help defend against their enemies. *Id.* Ambassadors sent by the states to promote these alliances or to make peace were accorded immunity and were regarded as under the protection of Zeus. *Id.* Any molestation of them therefore was considered a grave offense against the gods and the city that sent them. *Id.*

41. *Id.* at 18-22. See also ABBA EBAN, *THE NEW DIPLOMACY: INTERNATIONAL AFFAIRS IN THE MODERN AGE* 335 (1983) ("[T]here is a great deal of political and military diplomacy in the biblical narrative [K]ings, queens, generals and other dignitaries are portrayed as sending messengers to adversaries in the region, usually with such unwelcome tidings that they would need every ounce of immunity that they could get.").

The modern form of diplomatic immunity began to take shape during the Renaissance period with the establishment of resident ambassadors.⁴² A resident ambassador is defined as "a regularly accredited envoy with full diplomatic status sent . . . to remain at his post until recalled, in general charge of the interests of his principal."⁴³ By 1500, the major European powers were exchanging residential ambassadors between their courts.⁴⁴ It is believed that the use of residential ambassadors originated in Italy and then spread throughout Europe.⁴⁵ The international community regarded privileges and immunities for resident ambassadors as a novel concept in the sixteenth and seventeenth centuries, and the limits of such immunities were fiercely debated.⁴⁶

Diplomatic immunity arose as an extension of sovereign immunity.⁴⁷ Dealings with other countries, before the days of interstate commerce, were conducted through a sovereign's accredited representatives.⁴⁸ It was deemed likely that the representatives would at some time, as a natural result of their presence in the foreign state, become involved in matters susceptible to litigation.⁴⁹ Because they represented the sovereign, such individuals were considered diplomatic agents and were accorded the same immunity as the sovereign himself.⁵⁰

42. McCLANAHAN, *supra* note 35, at 25.

43. *Id.* (quoting GARRETT MATTINGLY, *RENAISSANCE DIPLOMACY* 64 (1955)).

44. *Id.* at 26.

45. *Id.*

46. *Id.* at 26-27 (citing GARRETT MATTINGLY, *RENAISSANCE DIPLOMACY* 278-79 (1955)).

Sovereigns were usually anxious to preserve diplomatic contacts, and consequently tolerant of the incidental frictions which such contacts entailed. At the same time the growing embassy staffs, groups of specially privileged foreigners resident among populations quick to suspect them of misbehavior and evil intentions, multiplied the opportunities for friction. Embassy staffs ranged from grave secretaries and young aristocrats through tough couriers and lackeys They were not always carefully selected As such groups began to realize that their immunity from local prosecution could be extended by the insistence of the ambassador . . . it is not surprising that municipal authorities and city mobs responded to their provocations with violence. Embassy servants were attacked in the streets. Embassy precincts were forcibly invaded by local officers. Now and then some ambassador's residence stood for days what almost amounted to a siege.

Id.

47. See CHARLES LEWIS, *STATE AND DIPLOMATIC IMMUNITY* 98 (1980) ("The inviolability, in theory, of the herald and the flag of truce had been recognized as a practical necessity from earliest times, but, as a matter of law, it was the consideration that the sovereign's dignity and independence must be preserved that gave protection to his diplomatic agents.").

48. *Id.*

49. *Id.*

50. *Id.* ("[T]he privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on account of those he represents The foundation of this privilege is for the sake of the prince by whom an ambassador is sent.").

1. *The Origin, Definition and Current Interpretation of Mission Inviolability*

One of the principle immunities extended to foreign diplomats is mission inviolability. The doctrine of mission inviolability, as formulated by the Vienna Convention, guarantees diplomats of a sending state that the receiving state's agents will not enter their mission premises without the consent of the mission head.⁵¹ In addition, mission inviolability provides the mission premises and any personal property located thereon with immunity from search or seizure.⁵² In *767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire*, Zaire invoked mission inviolability as a defense to the eviction action brought by the partnership, thus creating the conflict which was the focus of the Second Circuit's opinion in that case.⁵³

The inviolability of dignitaries has been recognized as far back as the roots of diplomacy itself.⁵⁴ In ancient India, the importance of diplomatic inviolability was addressed in Kautilya's *Artha-Sastra*, a fourth-century piece on foreign relations which states that "[m]essengers are the mouth-pieces of Kings . . . hence messengers who, in the face of weapons raised against them, have to express their mission as exactly as they are entrusted . . . do not . . . deserve death."⁵⁵

The generally recognized rule of mission inviolability was accepted and applied in the United States, over two hundred years ago, in the early case of *Respublica v. de Longchamps*.⁵⁶ In *Longchamps*, the accused, an American citizen, was charged with entering the premises of the French Legation, located in Pennsylvania, and threatening the French Secretary.⁵⁷ The Court found the defendant guilty and explained that entering the mission without permission was "an infraction of the law of nations" which was part of the law of

51. McCLANAHAN, *supra* note 35, at 50 (citing Vienna Convention, *supra* note 1, 23 U.S.T. at 3237-38, 500 U.N.T.S. at 106, 108).

52. *Id.* (citing Vienna Convention, *supra* note 1, 23 U.S.T. at 3237-38, 500 U.N.T.S. at 106, 108).

53. See *infra* notes 111-123 and accompanying text (discussing the Second Circuit's analysis of the impact of mission inviolability on *767 Third Avenue Associates*' property rights).

54. See McCLANAHAN, *supra* note 35, at 23 (explaining that "[i]n ancient India, kings and princes sent envoys to one another and had at least tenuous diplomatic relations with the Hellenistic kingdoms formed out of Alexander's brief empire Envoys were accorded immunities and personal inviolability").

55. *Id.* (quoting G.V.G. KRISHNAMURTY, *MODERN DIPLOMACY: DIALECTICS AND DIMENSIONS* 49 (1980)).

56. 1 U.S. (1 Dall.) 111 (1784).

57. *Id.* at 114.

Pennsylvania.⁵⁸ The Court ruled that the person of a public minister was "sacred and inviolable" — the same reasoning which established the inviolability of a minister was to be applied to "secure the inviolability of his house" which was to be "defended from all outrage."⁵⁹

After *Respublica v. de Longchamps*, Congress passed the Diplomatic Relations Act of 1790 which made it an offense to "offer violence" to an ambassador or other public minister or any of their domestic servants, or for distraint, seizure or attachment of their goods, and imposed a penalty on any party issuing or executing any such process.⁶⁰ Section 26 of the 1790 statute enforced the inviolability of diplomats by threatening to impose criminal sanctions upon those who processed wrongful suits against diplomats.⁶¹

In the eighteenth and nineteenth centuries, two principles, "extra-territoriality" and "representation, formed the basis for diplomatic immunity."⁶² Under the extritoriality theory, foreign premises were considered the territory of the sending state, notwithstanding that they were actually located in the receiving state.⁶³ Thus, the extritoriality doctrine created a legal fiction which accorded a diplomat who resided in such premises immunity because he was "legally outside the territory of the host state."⁶⁴ The second principle was the theory of representation.⁶⁵ Under this theory, the diplomat "personifies his sovereign whose dignity does not permit subjugation to the jurisdiction of a foreign sovereign"; an insult to the ambassador was consid-

58. *Id.*

59. *Id.* The Court stated that the minister's house was "under a peculiar protection of the laws; to invade its freedom is a crime against the state and all other nations." *Id.*

60. Diplomatic Relations Act of Apr. 30, 1790, ch. 9, 1 Stat. 117-18.

61. *Id.* at ch. 9, § 26, 1 Stat. 118. This section provided that

in case any person or persons shall sue forth or prosecute any such writ or process, such persons or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the court.

Id. The first five sections of the Diplomatic Relations Act of 1978, 22 U.S.C. § 254 (a) - (d) (1988), repealed the old 1790 law.

62. D.W. GREIG, *INTERNATIONAL LAW*, 261-62 (2d. ed. 1976). See also Farhangi, *supra* note 2, at 1520 (defining "extritoriality" as the "approach to diplomatic immunity [which] adopts the legal fiction that a diplomat is always on the soil of her native country," and explaining "representation" as a "traditional diplomatic practice, [under which] a diplomatic envoy personifies the sovereign she represents") (footnote omitted).

63. *Id.* at 261.

64. William F. Marmon, Jr., *The Diplomatic Relations Act of 1978 and Its Consequences*, 19 VA. J. INT'L L. 131, 132 (1978) (citing M. OGDON, *JUDICIAL BASES OF DIPLOMATIC IMMUNITY* 62 (1936)).

65. *Id.*

ered an insult to the dignity of the sovereign.⁶⁶ The current theory supporting diplomatic immunity is "functional necessity."⁶⁷ This principle recognizes the practical necessity of diplomatic immunity: a diplomat needs enough immunity to accomplish his job.⁶⁸ In particular, the doctrine of functional necessity was the principle underlying the Vienna Convention.

2. *The Impact of the Vienna Convention on Diplomatic Relations*

Any discussion of contemporary diplomatic relations must consider the influence of the Vienna Convention.⁶⁹ The Vienna Convention on Diplomatic Relations was signed on April 18, 1961, and is one of the most universally accepted sources of international law.⁷⁰ Upon ratification by the United States on December 13, 1972, the Vienna Convention became enforceable.⁷¹ It consists of fifty-three articles, the purpose of which is to guarantee satisfactory completion of diplomatic functions.⁷² The Convention adopted the concept of diplomatic func-

66. *Id.* (quoting M. OGDON, *JURIDICAL BASES OF DIPLOMATIC IMMUNITY* 105 (1936)). Chief Justice Marshall addressed the representation theory in *Schooner Exchange v. McFaddon*: "The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers is implied from the consideration that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad." 11 U.S. (7 Cranch) 116, 138-39 (1812).

67. Marmon, *supra* note 64, at 132.

68. *Id.* The functional necessity approach justifies immunity on the grounds that diplomats could not fulfill their diplomatic functions without such privileges: "If diplomats were liable to ordinary legal and political interference from the state or other individuals, they would be dependent on the good will of the receiving state. Considerations of safety and comfort might materially hamper the exercise of their functions." Farhangi, *supra* note 2, at 1521.

69. Vienna Convention, *supra* note 1, 23 U.S.T. 3227, 500 U.N.T.S. 95. See Ernest L. Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, in *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* 438 (Leo Gross ed., 1969) (stating that the Vienna Convention, unlike prior similar international conferences, produced creditable formulations of international law). The United Nations Conference on Diplomatic Intercourse and Immunities met at the Neue Hofburg in Vienna from March 2 to April 14, 1961. *Id.* The General Assembly passed Resolution 1450 (XIV) which memorialized the Assembly's decision to convene an international conference of diplomats to consider the question of diplomatic intercourse and immunities. *Id.* The resolution invited "all States Members of the United Nations, States members of the specialized agencies . . . and intergovernmental organizations" to the conference. *Id.*

70. See McCLANAHAN, *supra* note 35, at 44 (recognizing that the Vienna Convention is the starting point for any discussion of contemporary diplomatic privileges and immunities); see also Farhangi, *supra* note 2, at 1521 (acknowledging that the Vienna Convention governs every aspect of diplomatic immunity); Marmon, *supra* note 64, at 137 n.31 (stating that the Vienna Convention was the first comprehensive, truly international convention on diplomatic immunities).

71. GREIG, *supra* note 62, at 254.

72. McCLANAHAN, *supra* note 35, at 45. The functions of a diplomatic mission consist, *inter alia* of

- 1) representing the sending State in the receiving State; 2) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; 3) negotiating with the Government of the receiving State; 4)

tional necessity in its preamble, a major component of which is mission inviolability.⁷³

Article 22 of the Convention explains "mission inviolability" as follows:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.⁷⁴

Several nations, including the United States, proposed Amendments to Article 22 which sought to limit the extent of mission inviolability.⁷⁵ For example, many nations recommended restricting the effect of paragraph one of Article 22 in cases of public emergency.⁷⁶ In particular, Mexico proposed a provision which required "the head of mission [to] co-operate with local authorities in case of fire, epidemic or other extreme emergency."⁷⁷ Ireland and Japan jointly proposed an alternate amendment to this paragraph, which stated that mission inviolability should not preclude a receiving state from "taking measures essential for the protection of life and property in exceptional circumstances of public emergency or danger."⁷⁸ Both of the foregoing amendments were subsequently withdrawn.⁷⁹ By contrast, the United States proposed that the mission head's consent to entry should be presumed in cases of public emergency or exceptional danger "when immediate entry is necessary to protect life and prop-

ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; and 5) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

Id. at 48.

73. Vienna Convention, *supra* note 1, 23 U.S.T. at 3230, 500 U.N.T.S. at 96. The preamble to the Vienna Convention states that the purpose of granting diplomatic immunity is "not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." *Id.*

74. *Id.*, 23 U.S.T. at 3237-38, 500 U.N.T.S. at 106, 108.

75. See Kerley, *supra* note 69, at 452 (discussing amendments proposed by Japan, Ireland, and Mexico).

76. *Id.*

77. *Id.* (quoting U.N. Doc. A/CONF.20/C.1/L. 129 (1961)).

78. *Id.* (citing U.N. Doc. A/CONF.20/C.1/L. 163 (1961)).

79. Kerley, *supra* note 69, at 452-53.

erty.”⁸⁰ In addition, the Indian contingency suggested creating an exception to mission inviolability which granted landlords a right of periodic inspection of the leased premises.⁸¹

Although none of the above suggested amendments were adopted, the Commission commented that a sending state possesses a moral duty to cooperate with the receiving state.⁸² Similarly, the United States, in its comments to the Commission, proclaimed that “[t]he United States Government is of the view that international law does not absolutely preclude the requisition of such property or its taking by exercise of right of eminent domain. This right, of course, could only be exercised under very limited circumstances.”⁸³ Today, the Vienna Convention, which sets forth a liberal interpretation of mission inviolability, contains one of the most widely-accepted formulations of diplomatic immunity,⁸⁴ and was the primary authority upon which the court relied in *767 Third Avenue Associates*.

II. SUBJECT OPINION: *767 THIRD AVENUE ASSOCIATES V. PERMANENT MISSION OF THE REPUBLIC OF ZAIRE*⁸⁵

In *767 Third Avenue Associates*, the plaintiffs consisted of a partnership, 767 Third Avenue Associates, which owned a building at that address in New York City, and Sage Realty Corporation, the managing general agent for the building (collectively, 767 Third Avenue Associates).⁸⁶ On May 19, 1982, Sage Realty, as agent for 767 Third Avenue Associates, entered into a written lease with the Mission of Zaire for a ten year period beginning on June 21, 1982, for the entire 25th floor of the building.⁸⁷ After about five years, Sage Realty began to have difficulty collecting rent from the Mission.⁸⁸ As a result, plaintiffs filed two lawsuits. The first lawsuit commenced in 1987,

80. *Id.* at 453. Dr. Amado expressed the same sentiments at the International Law Commission sessions in 1958 when he stated that “it was impossible to make provision for every contingency in the draft. It was hardly conceivable that a head of a mission would fail to cooperate with the authorities in an emergency.” *Id.* (quoting 1 INT’L LAW COMM’N Y.B. (1958) 129-130 U.N. Doc. A/Cn.4/SER.A/1958)). Dr. Amado was specifically opposed to the idea of a body of international lawyers dictating to heads of missions what their elementary duties as human beings were. *Id.*

81. *See id.* (explaining that the Indian amendment was criticized as being more appropriate as a lease provision rather than as a principle of international law).

82. *Id.* at 453-54 (citing *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 13th Sess., Supp. No. 9, at 17-18, U.N. Doc. A/3859 (1958)).

83. *Id.* at 454 (quoting U.N. GOAR, 14th Sess., Supp. No. 9, at 43, U.N. Doc. A/4164 (1958)).

84. McCLANAHAN, *supra* note 35, at 44.

85. 988 F.2d 295 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 74 (1993).

86. *Id.* at 296.

87. *Id.*

88. *Id.*

when 767 Third Avenue Associates brought an action against the Mission after it had failed to make rental payments.⁸⁹ On August 22, 1989, the trial court awarded 767 Third Avenue Associates possession of the premises and \$244,157.49 in damages.⁹⁰ After the August judgment, the Mission paid the full amount of damages, and 767 Third Avenue Associates allowed the Mission to remain in possession of the property as a month-to-month tenant under an oral agreement.⁹¹

In 1991, the Mission again defaulted in its rental payments.⁹² On April 20 of that year, 767 Third Avenue Associates notified the Mission that they were terminating the Mission's month-to-month tenancy.⁹³ When Zaire refused to vacate the premises, 767 Third Avenue Associates commenced a second action against the Mission to recover damages and to evict Zaire.⁹⁴ The district court granted the plaintiff's motion for summary judgment on November 14, 1991.⁹⁵ The court awarded the partnership \$387,154.72 in damages through October 31, 1991, and additional damages of \$832.19 for every day, beginning November 1, 1991, that the Mission continued to occupy the premises.⁹⁶ The court also ordered the Mission to vacate the premises.⁹⁷ Finally, the court authorized the United States Marshalls to remove the Mission if the Mission refused to remove its personal property.⁹⁸

Although the court did not specify the date by which the Mission was to vacate its rental premises, the court issued a supplemental order on January 15, 1992, which imposed a January 31, 1992, deadline for the Mission to vacate.⁹⁹ The Mission sought a stay of the supplemental order pending appeal.¹⁰⁰ The trial court granted a temporary stay to allow the parties to more fully brief the issue of diplomatic immunity, but denied Zaire's request for a stay pending appeal.¹⁰¹

89. *Id.*

90. *Id.*

91. *Id.* At the time the Mission became a month-to-month tenant, the rental payments for the premises were \$19,350 per month.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* The trial court rejected Zaire's claim of irreparable injury in the absence of a stay, pointing out that the premises were not unique and despite the abundant notice, Zaire had not attempted to locate nor arrange any alternative housing. *Id.*

The court ultimately granted a limited stay until April 20, 1992, to allow the Mission time to vacate the premises in an orderly manner.¹⁰²

The trial court determined that neither the various treaties ratified by the United States nor the Foreign Sovereign Immunities Act (FSIA)¹⁰³ supported the defendant's contention that a private landlord could be compelled to host a non-paying tenant *ad infinitum*, simply because that tenant is a foreign mission.¹⁰⁴ In this regard, the fact that the United States Government refused to ensure the partnership's ability to collect the Mission's rent played an important role in the court's decision.¹⁰⁵ Consequently, the district court concluded that it would be inequitable to impose the entire burden of the executive branch's asserted foreign policy objectives on the shoulders of a single private landlord.¹⁰⁶

In reversing the trial court's ruling, the Second Circuit Court of Appeals determined that "[t]he inviolability of a United Nations mission under international and United States law precludes the forcible eviction of the Mission."¹⁰⁷ The appellate court explained that treaties, like statutes, bind the federal courts.¹⁰⁸ While Congress aimed to permit courts to make sovereign immunity determinations under the FSIA, according to the Second Circuit, the FSIA expressly provides that it operates subject to existing international agreements to which the United States is a party.¹⁰⁹ Thus, the appellate court refused to accept the proposition that the FSIA alters the diplomatic protections recognized under international treaties.¹¹⁰

Although the court recognized that several treaties govern diplomatic relations, it focused primarily on the Vienna Convention, which

102. *Id.* The court did not want to force a "hasty eviction" because such haste might compromise the confidentiality of the Mission's papers located on the premises. *Id.* Moreover, the parties finally agreed that the district court's eviction order be stayed pending appeal due to numerous meetings among U.S. officials, the United Nations Legal Counsel, and Zaire's Charge d'Affaires. *Id.* at 296-97. As a result of these meetings, the United States State Department issued an ultimatum to Zaire demanding the Republic to immediately pay its back rent in full or the United States would deport two Zairian officials and their families who resided at the Mission. *Id.* Consequently, Zaire paid its rental arrearages. *Id.* at 297.

103. 28 U.S.C. §§ 1602-1611 (1988).

104. 767 Third Avenue Assocs. v. Permanent Mission of the Rep. of Zaire, 787 F. Supp. 389, 395 (S.D.N.Y. 1992).

105. *Id.* at 396-97.

106. *Id.* at 396. The court reasoned that to hold otherwise would "raise a serious issue as to whether Plaintiffs had been subjected to an unconstitutional 'taking' under the Fifth Amendment." *Id.*

107. 767 Third Ave. Assocs. v. Permanent Mission of the Rep. of Zaire, 988 F.2d 295, 297 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 74 (1993).

108. *Id.*

109. *Id.*

110. *Id.*

directly addresses the issue of mission inviolability.¹¹¹ In examining the impact of the Vienna Convention upon the case before it, the court asserted that the drafters of the Convention expressly intended that missions enjoy broad inviolability under Article 22.¹¹² The court found support for its assertion in the fact that many nations involved in drafting the Vienna Convention proposed exceptions to mission inviolability, none of which were incorporated into the final document.¹¹³ The court further supported its broad interpretation of mission inviolability by quoting the commentary to the draft of Article 22, which stated that "the receiving State is obliged to prevent its agents from entering the premises for any official act whatsoever."¹¹⁴ Moreover, the court pointed out that the United States has never before disregarded the complete inviolability of missions and has never entered a mission's premises without consent — even in extreme situations such as bomb threats or health risks.¹¹⁵ The court thus concluded that the extent of mission inviolability "could [not] be stated more plainly," and that because no evidence of contrary interpretations existed, the federal courts must defer to the express language of Article 22.¹¹⁶

Beyond the plain language of Article 22, the Second Circuit claimed that if mission inviolability was not honored and Zaire's mission was evicted, American diplomats abroad may likewise be denied protection of their lives and property.¹¹⁷ The court stated: "That possibility weighs so heavily on the scales of justice that it mitigates against enforcement of the landlord's right to obtain possession of its property for rental arrears."¹¹⁸ Therefore, the Second Circuit held that United States officials may not enter a mission to evict foreign diplomats, affirming the lower court's judgment awarding plaintiffs monetary damages and reversing the lower court's eviction order.¹¹⁹ In so holding,

111. *See id.* at 298 (noting that numerous other treaties, including the United Nations Charter, the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, and the Convention on the Privileges and Immunities of the United Nations speak to the issue of diplomatic immunity).

112. *Id.*

113. *Id.* at 298-99. *See supra* notes 75-81 and accompanying text (discussing the proposed exceptions to mission inviolability for emergency situations).

114. *Id.* at 299 (quoting *Report of the International Law Commission, Diplomatic Intercourse and Immunities*, U.N. GAOR, 12th Sess., Supp. No. 9, at 137, U.N. Doc. A/3623 (1957)).

115. *See id.* at 301 (remarking that after the Soviet mission to the U.N. was bombed in 1979, FBI agents and local police officers were all refused admission into the Mission until the Soviets consented to the entry of certain officers).

116. *Id.* at 299.

117. *Id.* at 301.

118. *Id.* at 296.

119. *Id.* at 299, 303.

the Second Circuit dismissed the district court's conclusion that, under the Vienna Convention, the purpose of mission inviolability is to prevent sudden invasions.¹²⁰

The appellate court indicated that it was aware of the negative policy implications of its decision and suggested that, although reforming the Vienna Convention may well be a valid objective, the federal courts were an inappropriate forum for such change.¹²¹ Absent such legislative reform, the court suggested two alternatives to prevent future litigation in similar matters. First, the court recommended increased involvement by the State Department in resolving such disputes.¹²² Second, the court suggested that landlords, in negotiating future leases with foreign missions, could request an advance waiver of inviolability or demand additional security.¹²³

III. ANALYSIS

The 767 *Third Avenue Associates* court was confronted with a serious conflict. Resolution of this conflict forced the Second Circuit to balance the fundamental property rights accorded United States citizens against the policy dictates of a significant international treaty, the Vienna Convention. Ultimately, the court held that Zaire could not be evicted from its mission for nonpayment of rent, thus elevating the rights of foreign diplomats over those of American private property owners. As discussed above in Part II.B., when the government interferes with a private property owner's use and enjoyment of his land to the extent of effecting a taking, the Constitution commands the government to pay that property owner just compensation. Thus, so long as the Vienna Convention's liberal policy of mission inviolability

120. *Id.* at 301. Contrary to the appellate court, the district court found that "[n]othing in the commentary to the draft articles suggests that fears about 'mob violence' and 'unannounced seizures' were ever the main concerns underlying diplomatic immunity." *Id.*

121. *Id.* at 302. The court stated that Congress "is the branch of government best suited to address the full array of concerns involved in altering the Vienna Convention." *Id.* The court remarked that the legislature had enacted the Diplomatic Relations Act of 1878 to address some of the more egregious abuses of diplomatic privilege. *Id.* The Act, stated the court, empowers the President to, among other things, limit mission inviolability. *Id.* The court found it significant that no President has ever exercised such power. *Id.* Therefore, the court believed any reform of the Vienna Convention is appropriately left to Congress and not the executive or the judiciary branches. *Id.* at 302-03.

122. *Id.* at 303. The court noted that "to date, diplomatic efforts and pressure have proven extraordinarily successful at getting Zaire to pay the judgment for its back rent. The State Department has diligently pursued the matter on behalf of plaintiffs and went so far as to demand the expulsion of several Zairian diplomats if the judgment was not paid by a certain deadline." *Id.*

123. *Id.* The court contemplated that, as a result of increased risk, "[t]he market rate for rent to such tenants might itself rise to incorporate risks posed by mission inviolability." *Id.*

stands to prevent a foreign Mission from being evicted from its rental premises for nonpayment of rent, the United States Government must compensate affected landlords under the Takings Clause for loss of dominion over their property.

A. The Broad Formulation of Mission Inviolability under the Vienna Convention Supports the Second Circuit's Holding

The district court correctly asserted that the doctrine of mission inviolability principally seeks to prevent sudden invasions upon foreign missions. To effectuate this goal, the Vienna Convention adopted a sweeping interpretation of mission inviolability into Article 22 which expressly provides that under no circumstances is a mission to be entered without the consent of the mission head. Moreover, the commentary to Article 22 indicates that mission inviolability means that "the receiving State is obliged to prevent its agents from entering the premises for any official act whatsoever."¹²⁴ Arguably, the rejected amendments proposing to limit mission inviolability in emergency situations would not have compromised the goal of preventing sudden invasions of foreign missions.¹²⁵ The drafters of the Convention, however, apparently seeking to avoid loopholes in Article 22, elected to adopt a broad interpretation of mission inviolability. Therefore, the Second Circuit properly concluded that under no circumstances should mission inviolability be threatened. Nonetheless, this government policy amounts to a taking of 767 Third Avenue Associates' property which entitles the partnership to just compensation under the Fifth Amendment.

B. The Takings Clause Requires the United States Government to Fairly Compensate Landlords Affected by the Second Circuit's Decision

The government's duty to protect property rights of United States citizens is an important function of government.¹²⁶ When the Second Circuit precluded 767 Third Avenue Associates from evicting the Zairian mission, it effectively denied the partnership the power to control its land, thus violating 767 Third Avenue Associates' property rights. Accordingly, the partnership should have been compensated

124. *Id.* at 299 (quoting *Report of the International Law Commission, Diplomatic Intercourse and Immunities*, U.N. GAOR, 12th Sess., Supp. No. 9, at 137, U.N. Doc. A/3623 (1957)).

125. See *supra* notes 75-81 and accompanying text (discussing the rejected amendments to the Vienna Convention which would have ameliorated the harsh impact of mission inviolability in emergency situations).

126. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977).

under the Takings Clause. While the Second Circuit did not address the takings issue, the district court Judge acknowledged that an eviction order was necessary to prevent a governmental taking.¹²⁷

As discussed in Part II.B., courts have found that a governmental taking can occur when the government infringes on an individual's contractual rights notwithstanding that no physical "taking" of the property has occurred.¹²⁸ In *767 Third Avenue Associates*, the Second Circuit's holding results in a clear infringement upon the partnership's contractual right to enforce the lease it entered into with the Republic of Zaire. Specifically, the facts of *767 Third Avenue Associates* satisfy the three standards articulated by the Court in *Connolly v. Pension Benefit Guaranty Corp.*¹²⁹ for determining whether a compensable governmental taking has occurred.¹³⁰

The first factor the *Connolly* court considered was the extent to which the regulations interfered with the property owner's investment-backed expectations. In this case, the partnership's investment-backed expectations consisted of receiving rent from Zaire in exchange for Zaire's use of its premises.¹³¹ The partnership sought Zaire's eviction upon the Mission's failure to satisfy its rental obligations.¹³² Although its rental payments were long past due, Zaire continued to occupy the premises without compensating 767 Third Avenue Associates for such use.¹³³ By refusing to allow the partnership to evict Zaire or relet the premises, the government significantly interfered with 767 Third Avenue Associates' opportunity to gain a return on the time, money and resources that it had invested in the rental premises.

The second factor considered by the *Connolly* court was the economic impact of the regulation on the claimant. In *767 Third Avenue Associates*, the partnership suffered a significant economic loss as a

127. Brief for Appellee at 6, *767 Third Ave. Assocs. v. Permanent Mission of the Rep. of Zaire*, 988 F.2d 295 (2d Cir. 1993) (No. 92-7184).

[The district court judge] found that it would be manifestly inequitable to impose the entire burden of the executive branch's asserted foreign policy objectives "on the shoulders of a single private landlord." As [the district court judge] stated, "any other conclusion would raise a serious issue as to whether Plaintiffs had been subjected to an unconstitutional 'taking' under the Fifth Amendment."

Id.

128. See *supra* notes 29-33 and accompanying text (discussing the requirements for a nonphysical "taking" of a person's property).

129. 475 U.S. 211 (1986).

130. See *supra* text accompanying note 33 (enumerating the three *Connolly* factors).

131. *767 Third Ave. Assocs. v. Permanent Mission of the Rep. of Zaire*, 988 F.2d 295, 296 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 74 (1993).

132. *Id.*

133. *Id.*

result of the court's decision. The fact that the court awarded the partnership monetary damages is of little consequence, since, as the Second Circuit noted, Zaire was suffering from extreme economic difficulty.¹³⁴ In fact, in 1993, when the case was first decided, the economic situation in Zaire was so desperate that its embassy was impoverished.¹³⁵ Zaire's diplomats were forced to use their spouses' babysitting money to put food on their tables.¹³⁶ At the same time, however, the partnership was losing \$19,500 per month in rental income while Zaire remained in possession of the premises.¹³⁷

Due to Zaire's unfortunate financial condition, little hope exists that 767 Third Avenue Associates will ever be able to collect the damages that the court awarded.¹³⁸ An award of monetary damages promised little comfort to the partnership, which was confronted with the harsh reality that it would never collect its judgment. Thus, the negative economic impact of the Second Circuit's decision on the partnership multiplied each day that the Mission continued its rent-free occupation of the 767 Third Avenue premises.

The third standard articulated by the *Connolly* court is the extent of the governmental action. Here, the doctrine of mission inviolability gave the United States Government the authority to recognize the diplomatic immunity of the Zairian mission over the property rights of the partnership.¹³⁹ The Takings Clause of the Fifth Amendment, however, specifically states that "private property [shall not] be taken for public use, without just compensation,"¹⁴⁰ regardless of authority to act. Therefore, the substantial protections afforded the Mission under the Vienna Convention must be tempered by the United States Government's duty to compensate the partnership for the taking of the 767 Third Avenue premises. By failing to order the government to

134. *Id.* at 297.

135. David Frum, *Diplomatic Impunity*, FORBES, Apr. 26, 1993, at 110.

136. *Diplomats Pay the Price of Zaire's Economic Woes*, AGENCE FRANCE PRESSE, Mar. 10, 1994, available in LEXIS, News Library, Non-US File. The Mission has not received its monthly \$12,000 to \$15,000 stipend for more than two years. *Id.* Diplomats have gone without salaries for months. *Id.* At least one diplomat had to depend on a local church for food assistance. *Id.* Gas and water service to the mission have been cut off because bills have gone unpaid. *Id.* Paint has peeled from the ceiling of the main reception room because of water damage, and has been left littered on the grungy carpet. *Id.* The ceiling of a first-floor office collapsed and was never repaired. *Id.*

137. *Id.*

138. Significantly, the United States government cut Zaire's foreign aid from \$31 million in 1990 to \$3.5 million last year because of Zaire's nonpayment of international debts. Frum, *supra* note 135, at 110.

139. See *supra* notes 74-84 and accompanying text (discussing the protection that the Vienna Convention's broad interpretation of mission inviolability accords foreign diplomats).

140. U.S. CONST. amend. V.

compensate the partnership for this taking, the Second Circuit forced 767 Third Avenue Associates to bear a "public burden which, in all fairness and justice, should [have been] borne by the public as a whole."¹⁴¹

C. *The Second Circuit's Decision Arguably Prevented Serious International Repercussions*

If the United States had evicted Zaire, strong international reactions quite possibly could have followed. This argument is supported by an examination of past diplomatic incidents. In particular, whenever one country has taken legal action against another, the trend has been that a second has responded with reciprocal measures.¹⁴² For example, when local officials in Glen Cove, New York, denied Soviet diplomats access to the town's beaches, the Soviets retaliated against the American mission in Moscow by rescinding the Embassy's beach privileges at a nearby river.¹⁴³ Likewise, when Great Britain detained the Nigerian airplane kidnappers planned to use, Nigeria responded by detaining a commercial British Caledonian jet.¹⁴⁴ As one commentator stated: "In some countries it would be easy to trump up charges against a diplomat or his family. That could lead to retaliation that would get out of hand."¹⁴⁵ Therefore, the fear of adverse foreign action against United States ambassadors is not without merit, which justifies the Second Circuit's concern that United States ambassadors could possibly feel repercussions if it did not strictly honor Zaire's mission inviolability.

In sum, although the Second Circuit's decision upheld the sound international policy of liberal mission inviolability, a single American property owner should not have been required to bear the entire burden for the nation's international policy decisions. Governmental policy justifications do not distinguish the fact that the court's decision allowing the Zairian mission to continue to occupy the premises rent free constituted a governmental taking. Therefore, under the express directive of the Fifth Amendment, the United States Government should have provided 767 Third Avenue Associates with just compensation.

141. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

142. Farhangi, *supra* note 2, at 1544.

143. *Id.* at 1544-45 n.142.

144. *Id.* at 1545.

145. *Id.* at 1545 n.142 (quoting David Newsome, director of the Institute for the Study of Diplomacy at Georgetown University).

IV. IMPACT

The benefits of mission inviolability are evident. Mission inviolability facilitates transactions with foreign sovereigns and protects foreign ambassadors.¹⁴⁶ As the Second Circuit recognized, however, in *767 Third Avenue Associates* the burden of mission inviolability fell almost exclusively on the private landlord, and not upon the public as a whole.¹⁴⁷ In addressing the issue of who should bear the economic burden of Zaire's failure to satisfy its rental obligations, the Second Circuit acknowledged that "[r]eforming the Vienna Convention may well be a valid objective. But federal courts are an inappropriate forum to accomplish the amendment of a multilateral treaty to which the United States is a party."¹⁴⁸ Instead, the court asserted that such changes are best left to Congress.¹⁴⁹ As a result, it is up to the legislative branch to amend the Vienna Convention to limit the application of mission inviolability to protect landlords and to prevent property discrimination against newly formed sovereigns.

The State Department, however, has refused to support any amendment to the Vienna Convention.¹⁵⁰ For instance, in 1984, a subcommittee of the Senate Judiciary Committee held hearings on a bill which would have amended the Vienna Convention to make it a federal crime for any foreign diplomats in the United States to use firearms to commit a felony.¹⁵¹ Nonetheless, Congress resisted taking an active role in revising the Vienna Convention, adhering to the State Department's policy disfavoring any amendment to the Convention.¹⁵²

In 1987, Congress again debated a proposed amendment to the Vienna Convention. This time, Senator Jesse Helms had introduced a bill which would have amended key diplomatic provisions under the Vienna Convention to make members of diplomatic missions other than diplomatic agents or consular officers subject to "the criminal

146. See *supra* notes 67-68 and accompanying text (discussing the functional necessity doctrine).

147. *767 Third Ave. Assocs. v. Permanent Mission of the Rep. of Zaire*, 988 F.2d 295, 302 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 74 (1993).

148. *Id.*

149. See *supra* note 121 and accompanying text (discussing the reluctance of the judicial and executive branches to limit the application of mission inviolability).

150. See McCLANAHAN, *supra* note 35, at 166 (describing the State Department's negative response to proposed legislative revisions to the Vienna Convention).

151. *Id.* (citing *Firearm Felonies by Foreign Diplomats: Hearings on S. 2771 Before the Subcomm. on Security and Terrorism of the Comm. on the Judiciary*, 98th Cong., 2d Sess. 1, 68 (1984) (statement of Sen. Denton)).

152. See McCLANAHAN, *supra* note 35, at 167 (acknowledging Congress's acceptance of the State Department's position).

jurisdiction of the United States . . . for any crime of violence, . . . for drug trafficking, or for reckless driving or driving while intoxicated or under the influence of alcohol or drugs."¹⁵³ Congress voted not to adopt the Helms bill in accordance with the State Department's recommendation that passage of the bill would have violated the Vienna Convention and undermined long-standing international principles.¹⁵⁴

Beyond placing a public burden solely upon the shoulders of private landlords, the Second Circuit's decision will also prejudice newly developing countries as they seek to establish foreign missions in the United States. For instance, the *767 Third Avenues Associates* decision will likely make American landlords less willing to enter into lease agreements with foreign sovereigns. Assuming that landlords are willing to enter into rental transactions with foreign states at all, they may charge extraordinarily high rent to incorporate the risk that a court may refuse to enforce the lease's rental covenant. Alternatively, landlords may require foreign tenants to obtain a guarantor or to provide collateral to secure the tenant's promise to pay rent. At the same time, newly developing countries are increasingly seeking more space for their diplomatic quarters.¹⁵⁵ New York hosts the world's largest consular corps.¹⁵⁶ At least eighteen new missions were

153. *Id.* (quoting S. 1437, 100th Cong., 1st Sess., (1987)).

154. *Id.* at 167. Great Britain follows a similar policy regarding amendment to the Vienna Convention, reasoning that although deviation from the original Convention

"might make it easier to prevent existing abuses by a small minority of diplomatic agents . . . it would penalize the majority by exposing them to arbitrary harassment, detention or other abuse by a host government, either in retaliation for acts by a sending State or because the existing rules of conduct were no longer taken so seriously."

Id. at 176 (quoting House of Commons, First Report from the Foreign Affairs Committee, Session 1984-85, *The Abuse of Diplomatic Immunities and Privileges*, at app. 3). The British Diplomatic Service Personnel acknowledged the dangers inherent in amending the Vienna Convention, stating that Great Britain is

"a stable country ruled by due process of law. Such will not be the case in all countries where our diplomats serve, accompanied by their wives and families. The risks involved in departing from a strict interpretation of the Vienna Convention seem to us likely to fall disproportionately on our diplomats and their families and we would prefer them not to be run."

Id. at 177 (quoting House of Commons, First Report from the Foreign Affairs Committee, Session 1984-85, *The Abuse of Diplomatic Immunities and Privileges*, at app. 4).

155. See Susan Scherreik, *Demand of New, and Old, Nations Enlivens Market*, N.Y. TIMES, July 4, 1993, § 10, at 9 ("With the Breakup of the Soviet Union and its consequent ripple effect, many new countries are searching for diplomatic quarters in New York City or expanding recently acquired space."). For instance, the Ukraine is negotiating to purchase property in New York City for its diplomats. *Id.* In addition, Estonia has more than doubled the space it had occupied in New York City. *Id.* Similarly, Slovenia is using to four times the office space it had initially procured in New York City. *Id.* Moreover, Croatia is searching for a location in New York City in which to set up a consulate. *Id.*

156. *Id.*

established in New York in 1992 alone.¹⁵⁷ As one journalist remarked, "The last time the United Nations saw a similar surge in membership was in the early 60's with the end of colonialism."¹⁵⁸

From a practical standpoint, the new nations that join the United Nations must set up missions in New York City in which to house their foreign diplomats. Due to severe economic problems in their home countries, however, sufficient funds to do so are often unavailable.¹⁵⁹ These economic constraints thus force such fledgling countries to rent, rather than purchase, their mission premises.¹⁶⁰ The Second Circuit's decision exacerbates these economic difficulties by creating a legitimate fear that landlords will be less willing to enter into lease agreements with newly-formed countries because they do not want to risk suffering a fate similar to that of 767 Third Avenue Associates.¹⁶¹

For example, in November, 1993, the Ukraine was able to negotiate a \$392,000 three-year lease with an option to buy only after an American foundation agreed to guarantee payment if the Ukraine failed to meet its rental obligation.¹⁶² Unfortunately, many countries do not possess the ability to secure such guarantors.¹⁶³ Nor can they supply the collateral that landlords may now request.¹⁶⁴ Such restrictions may preclude many nations from setting up diplomatic missions in the United States, which will negatively impact American landlords by depriving them of rental income that they would have otherwise received.¹⁶⁵ Certainly, the drafters of the Vienna Convention did not envision this harsh result when they adopted the liberal definition of mission inviolability into Article 22 of the Convention.

VI. CONCLUSION

As long as foreign sovereigns interact, the need for diplomatic immunities will continue to exist. Diplomatic immunity has ensured an

157. *Id.* Additionally, four new consulates opened in Manhattan in 1992, bringing the total to 92. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 9.

161. *Id.* Mr. Moller, a counselor to the United States Mission to the United Nations, noted that "[t]hese countries aren't established financially and landlords are concerned they won't have recourse if a nation breaking a lease invokes diplomatic immunity." *Id.* He further stated that "[t]he diplomatic community generally has a good record of paying, but the occasional story about a deadbeat diplomat makes landlords nervous." *Id.*

162. *Id.* In this case, the guarantor was the Foundation in Support of Diplomatic Missions of Ukraine, which was founded by a dentist who fled the Ukraine in 1949. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

essential minimum level of freedom and independence for sending states' representatives and has enabled diplomats to safely work in potentially hostile foreign environments. Nonetheless, the concern for diplomatic efficiency should not override the constitutionally protected property rights of United States citizens. The United States Government, in allowing the defense of mission inviolability to prevent Zaire's eviction, effectively negated 767 Third Avenue Associates' control over their premises. To prevent similar injustices in the future, the United States has two choices: 1) limit the scope of mission inviolability by amending the Vienna Convention to protect the private property interests of landlords; or 2) justly compensate private citizens forced to bear the burden of a foreign sovereign's immunity for the benefit of the public. Due to the international community's reluctance to amend the Vienna Convention's mission inviolability provisions, the most viable alternative appears to be payment of just compensation under the Takings Clause.

An efficient, functioning government is a benefit that is shared by every United States citizen. This public benefit should not, however, be the burden of a single citizen. By compensating landlords like 767 Third Avenue Associates for the governmental taking of their property, the burden will be shared equally by all United States citizens because taxes will be used to compensate the partnership. The citizenry therefore may or may not tolerate Zaire's free tenancy. If they do not, their opinions will be heard by the legislature and the Vienna Convention will likely be reformed — a result the appellate court in *767 Third Avenue Associates* recommended.¹⁶⁶

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166. *767 Third Ave. Assocs. v. Permanent Mission of the Rep. of Zaire*, 988 F.2d 295, 302 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 74 (1993).

